RECENT DEVELOPMENTS

STATE MAY NOT COMPEL ASSOCIATION TO DISCLOSE NAMES OF MEMBERS

NAACP v. Alabama,
357 U.S. 449 (1958)

Alabama sought to enjoin the National Association for the Advancement of Colored People from further activities within the state. This action was precipitated by the failure of the Association, a New York nonprofit membership corporation, to qualify as a foreign corporation doing business within the state. The state denied the Association's claim to exemption, and alleged irreparable injury to the property and civil rights of the citizens of Alabama.[1]

With regard to the qualification issue the trial court ordered the production of Association records including a list of the names and addresses of all Alabama members. The defendant complied with the order in other respects, but refused upon constitutional grounds to produce its membership lists.

The Association was convicted for civil contempt and fined. The contempt action was upheld by the Alabama Supreme Court,[2] and certiorari was granted by the United States Supreme Court.[3] Two questions had to be decided: Did the petitioner have standing to assert the constitutional rights of its members? Did the court order unconstitutionally restrict the freedom of association of petitioner's members?

Mr. Justice Harlan, in voicing the unanimous opinion of the Court,[4] recognized its broad policy of avoiding constitutional adjudication where possible,[5] but here chose to follow its more recent holdings in *Joint Anti-Fascist Refugee Committee v. McGrath*[6] and *Barrows v. Jackson*,[7] that representatives have standing where the constitutional rights of

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[1] The bill in equity cited among other items the furnishing of financial and legal assistance to Negro students seeking admission to the state university and to the support of a Negro boycott of Montgomery bus lines in an effort to compel seating of passengers without consideration of race.

[2] *Ex parte* NAACP, 265 Ala. 349, 91 So. 2d 214 (1956).

[3] NAACP v. Alabama, 353 U.S. 972 (1957).

[4] NAACP v. Alabama, 357 U.S. 449 (1958).

[5] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (concurring opinion).

[6] 341 U.S. 123, 183-87 (1951) (concurring opinion). An organization placed upon the United States Attorney General's list of subversive groups to which federal employees could not belong was permitted to assert the constitutional rights of these employee members.

[7] 346 U.S. 249 (1953). The defendant in a damage action for breach of a racial restrictive convenant in a deed was permitted to raise the constitutional rights of those who were prevented by the covenant from purchasing land. *Accord,*

persons not before the Court can be protected effectively only through representation. In the instant case, if the rank-and-file members themselves had asserted their right to remain anonymous, an appearance in court would have nullified that right by destroying their anonymity.

This preliminary decision enabled the Court to consider whether the disclosure order constituted an unwarranted limitation upon the members' freedom of association.[8] It recognized as a practical matter that disclosure of affiliation with a group publicly advocating an unpopular position is likely to restrain one's free association with such group. Members of a particular religious faith or political party could not, for example, be required to wear identifying arm-bands.[9] The Court made reference to the fact that past disclosure of Association membership had exposed the members to physical and economic coercion, as well as to other signs of public hostility.

Whether this repressive effect actually constitutes state action presents more of a problem, but this seemingly did not trouble the Court. It held that even though the restraint in the final analysis would come from private sources it was the initial exercise of state power which would permit the private pressure to take effect. One questions whether this has not somewhat broadened the concept of state action developed in *Shelley v. Kraemer* and *Barrows v. Jackson* where judicial enforcement of racial restrictive covenants was held to constitute state action.[10] There the agreements were of a private nature to be enforced by the state. Here the state would make a disclosure and the actual coercion would come from private sources. Both are now considered to be state action conflicting with constitutional rights.

Once the Court determines that there is a limitation upon freedom of association by the state it must determine whether that limitation is constitutionally justified. This is essentially a balancing process between the interests of those restricted and the interests of the state. First amendment rights occupy a high position in the hierarchy of constitu-

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Columbia Broadcasting System v. United States, 316 U.S. 407 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[8] "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ." U.S. CONST. amend. I; ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. For authority that freedom of association is among the liberties protected by the due process clause see Staub v. City of Baxley, 355 U.S. 313, 321 (1958); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Palko v. Connecticut, 302 U.S. 319, 324 (1937); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[9] Amer. Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950). *Cf.* United States v. Rumely, 345 U.S. 41 (1953), a publisher cannot be required to disclose the identity of those who purchase his books.

[10] Judicial enforcement of a private agreement constitutes state action, Shelley v. Kraemer, 334 U.S. 1 (1948); judicial award of a damage remedy constitutes state action, Barrows v. Jackson, *supra* note 7.

tional freedoms and may be limited only when the state has a compelling interest.[11]

When citizens abuse the exercise of these freedoms the state may act to curb the abuse in the interest of the public safety, health, welfare or convenience, but it must not curtail the rights themselves.[12] Any attempt to restrict these first amendment freedoms must clearly be in the public interest and must be justified by a clear and present danger.[13]

The Court was unable to find a justification for the Alabama decree. The sole objective of the equity action was a determination whether the Association was conducting intrastate business in violation of Alabama's foreign corporation qualification act. Two issues in question were whether the Association was subject to the statute, and if so, whether its activities warranted expulsion from the state. Production of the membership lists was expected to help resolve these issues.

Without passing upon the merits of either issue the Court found that disclosure of the names of the rank-and-file members had no substantial bearing upon either of them.[14] The production order was not a reasonable means by which to accomplish the objective. Petitioner had already conformed with the other items demanded, including a list of its officers, the total number of its members and the amount of their dues. It is difficult to see how the names of the members could have contributed anything to the inquiry. In brief, the state failed to show an interest in the names sufficient to warrant an invasion of the members' constitutional rights.

The Court might well have stopped here, but it chose to go further. The state supreme court relied upon *Ex parte Morris*[15] from its own jurisdiction. Respondent relied heavily in its argument upon *New York ex rel. Bryant v. Zimmerman*.[16] In both cases a state was upheld in requiring membership lists to be submitted by branches of the Ku Klux Klan. Mr. Justice Harlan carefully distinguished the *Bryant* case from

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[11] Sweezey v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion).

[12] Keeping public streets clean does not justify prohibiting the distribution of religious literature, Schneider v. State, 308 U.S. 147, 160 (1939); privilege of using streets and parks to communicate may be regulated, but may not be abridged or denied, Hague v. CIO, 307 U.S. 496, 515-16 (1939); mere participation in a meeting of the Communist Party may not be made a crime, DeJonge v. Oregon, *supra* note 8, at 364-65.

[13] Thomas v. Collins, 323 U.S. 516, 530 (1945). *Accord,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Bridges v. California, 314 U.S. 252 (1941); Gitlow v. New York, *supra* note 8, at 672; Schenck v. United States, 249 U.S. 47, 52 (1919).

[14] In Sweezey v. New Hampshire, *supra* note 11, at 254, the Court stated with reference to petitioner's membership in the Progressive Party: "Thus, if the Attorney General's interrogation of petitioner were in fact wholly unrelated to the object of the legislature in authorizing the inquiry, the due process clause would preclude the endangering of constitutional liberties."

[15] 252 Ala. 551, 42 So. 2d 17 (1949).

[16] 278 U.S. 63 (1928).

the instant case, stressing the difference in nature between the two organizations. In *Bryant* the Ku Klux Klan had perpetrated acts of intimidation and violence to such an extent that the Court took judicial notice of them. The Klan also refused to furnish the State of New York with any information concerning its activities. The state has a great interest in curbing the action of such an organization. The Association, in contrast, has sought to enforce its doctrines through the courts. In this action it complied with the equity decree except for the production of membership lists. With this type of organization the state's interest in limiting its activities is slight. In one case state interest outweighs the constitutional interest of the group's members; in the other it does not.

Alabama did not have a strong position in this case. Except for broadening the concept of state action the Court follows quite closely its previous holdings in the area of free speech and assembly. The decision is clearly in line with precedent. Its major significance lies in the clear manner in which Mr. Justice Harlan reveals the process by which the Court balances the interest of the public against the interests of private citizens within the framework of the due process clause.

In this action Alabama sought to curb the activities of the Association by acting entirely through the judicial branch of its government. It was a court decree and not a statute which called for production of the membership lists. As a result the Court was not obligated to give any deference to a legislative finding of a need for restriction.[17] There was no finding of a clear and present danger to the public. Had there been a legitimate legislative finding of a clear and present danger the position of the state undoubtedly would have been stronger.

A Virginia statute requiring the registration of anyone advocating either racial integration or segregation in public schools, or raising funds to finance racial litigation has recently been challenged before a federal district court.[18] The expressed purpose of the act was to prevent the danger of racial violence, a danger found by the legislature to exist. The district court, however, after examining the legislative history of the act, found its real purpose to be the prevention of the enforcement of lawful integration of the races, and declared the statute to be invalid. What effect a legislative finding of clear and present danger in this area would have in swaying the opinion of the United States Supreme Court remains to be seen. Certainly the Court would examine the foundation for such a finding with great care.

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[17] In Amer. Communications Ass'n v. Douds, *supra* note 9, at 401, the Court stated: "The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions."

[18] NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958).